

PUBLIC WORKS & UTILITIES COMMITTEE

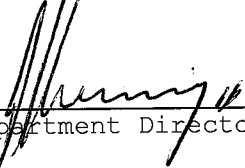
11-0604R

RESOLUTION AUTHORIZING A SANITARY SEWER LICENSE AGREEMENT WITH THE ST. LOUIS AND LAKE COUNTIES REGIONAL RAILROAD AUTHORITY FOR CONSTRUCTION, OPERATION AND MAINTENANCE OF A REPLACEMENT SANITARY SEWER FORCE MAIN NEAR MCCULLOUGH STREET.

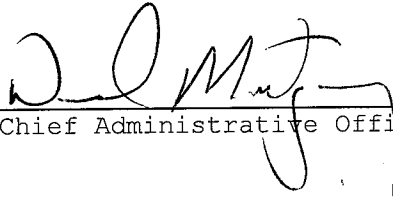
CITY PROPOSAL:

RESOLVED, that the proper city officials are authorized to enter into an agreement substantially in the form of that on file in the office of the city clerk as Public Document No. \_\_\_\_\_ with the St. Louis and Lake Counties regional railroad authority for the construction, operation and maintenance of a replacement sanitary sewer force main crossing St. Louis and Lake Counties regional railroad authority's lakefront line right-of-way at a location in the vicinity of McCullough Street in Lakeside at a cost of \$500.00, payable from Sanitary Fund 530, Department 500, Division 1905, Object 5536 (Sanitary Sewer Fund, Public Works & Utilities, Capital, Utility Infrastructure Replacement) Project No. 0892SN.

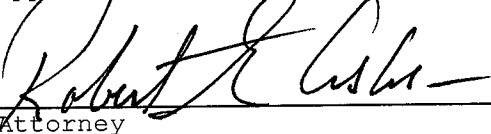
Approved:

  
\_\_\_\_\_  
Department Director


Approved for presentation to council:

  
\_\_\_\_\_  
Chief Administrative Officer

Approved as to form:

  
\_\_\_\_\_  
Attorney

Approved:

  
\_\_\_\_\_  
Auditor

STATEMENT OF PURPOSE: This resolution will authorize an agreement with the St. Louis and Lake Counties Regional Railroad Authority allowing the city to replace a sanitary sewer force main located in a portion of the railroad right-of-way near McCullough Street in Lakeside.

The authority controls the railroad easement and operates on the trackage that runs through Lakeside. The authority uses the trackage primarily for tourist train facilities, but also allows some freight shipments to use the corridor when needed.

The cost will be a one time fee of \$500.

## SANITARY SEWER FORCE MAIN LICENSE AGREEMENT

**THIS AGREEMENT**, made this \_\_\_\_\_ day of \_\_\_\_\_, 2011, by and between **ST. LOUIS AND LAKE COUNTIES REGIONAL RAILROAD AUTHORITY**, a political subdivision of the State of Minnesota, whose address is 111 Station 44 Road, Eveleth, MN 55734, herein referred to as "**Authority**," and **CITY OF DULUTH**, a municipal corporation and governmental subdivision of the State of Minnesota, whose address is City Hall, 411 West First Street, Duluth, MN 55802, herein referred to as "**City**." In consideration of the sum of **Five Hundred and No/100<sup>th</sup> Dollars (\$500.00)**, paid to **Authority** by **City** for the License herein granted, and the other covenants and agreement herein contained on the part of **City** to be paid, kept and performed, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

### SECTION 1. LICENSE

1.1 **Authority** hereby grants a non-perpetual, non-exclusive License to **City** to construct, operate, maintain, inspect, protect, survey, repair, replace or remove a sixteen (16) inch underground sanitary sewer force main, together with valves, fittings, protective apparatus and other equipment and appurtenances as may be necessary in connection therewith ("**Sewer Force Main**") which will replace a currently existing twelve (12) inch cast iron force main and will extend said force main under the **Authority's Lakefront Line Right-of-Way** ("**Right-of-Way**") at or near McCullough Street, said sewer force main to be for the transportation and distribution of sanitary sewage and associated by-products under the **Right-of-Way** from approximately Lakefront line railroad milepost (MP) 4.85 to MP 5.12 as more particularly described hereafter and in the documents referred to in attached Exhibit A, which documents are incorporated herein by reference ("**Plans and Specifications**"). The non-perpetual, non-exclusive License granted herein to **City** is limited to that portion of the **Right-of-Way** described as follows: beginning MP 4.85 at the north right of way line thence easterly for a distance of 256 feet (MP 4.9) thence southerly and parallel to McCulloch Street for a distance of 80 feet (MP 4.91) thence easterly for a distance of 1,144 feet (MP 5.12) thence southerly for a distance of 10 feet ending at south right of way line. ("**Sewer Force Main License Area**").

1.2 The physical location of the **Sewer Force Main**, including the crossing of **Authority's** tracks by the **Sewer Force Main**, is to be as indicated on the **Plans and Specifications**, and understood by the parties to be part of this Sanitary Sewer Force Main License Agreement ("**Agreement**"). At all times, the **Sewer Force Main** shall be located to avoid or minimize the need for adjustments for future railroad improvements and to permit access to the **Sewer Force Main** for its maintenance with minimum interference to railroad traffic. Any removal, remodeling, maintenance or relocation of the **Sewer Force Main**, whether requested by **City** or required by **Authority** will be accomplished promptly by **City** at no cost to **Authority**.

### SECTION 2. FEE

2.1 **City** shall pay **Authority** a one-time fee in the amount of **Five Hundred and No/100<sup>th</sup> Dollars (\$500.00)** on the date this **Agreement** is executed by both parties. It is expressly understood that the license herein granted to **City** is limited to the installation of one

(1) sanitary **Sewer Force Main** to be utilized for transporting and distributing sanitary sewage and associated by-products.

### **SECTION 3. USE**

3.1 The license herein granted authorizes **City** to construct, operate, inspect, protect, survey, repair, replace, remove and maintain one (1) underground gravity sanitary sewer solely for the purpose of transporting and distributing sanitary sewage and associated by-products and for no other purpose without **Authority's** prior written consent, the granting or withholding of which consent is solely in the discretion of the **Authority**. **City's** use, as herein defined, shall not be for any purpose which is forbidden by any applicable law, regulation or rule of any governmental authority, including local, state and federal, or which may invalidate any policy of insurance issued to **City** or **Authority**.

3.2 **City**, its successors and any permitted assigns, shall not use any other property of **Authority** other than that which is occupied by the **Sewer Force Main** and within the area specified in the **Plans and Specifications** and Section 1.1 above ("**Sewer Force Main License Area**") without first obtaining **Authority's** prior written consent and complying with all requirements imposed by **Authority**. It is the intention of the parties that **City** may have to request to use **Authority's** property outside of the **Sewer Force Main License Area** for purposes of constructing the initial **Sewer Force Main**. **City** will be allowed to temporarily utilize additional portions of **Authority's** property for access roads, road and track crossing boards, and other initial construction activities provided said areas are identified in writing to **Authority** and receive **Authority's** approval prior to commencing any construction activity.

3.3 **City**, its agents, servants, employees, directors, officers, contractors, subcontractors and suppliers, shall not permit any hazardous materials to be deposited on the **Right-of-Way** or other lands of **Authority** through its/their operations or actions. Notwithstanding the foregoing, if hazardous material is so deposited as a result of **City's** (or its agent's, servant's, employee's, director's, officer's, contractor's, subcontractor's and supplier's) action or omission or due to the transportation of hazardous materials, **City**, its successors and any permitted assigns, shall indemnify, save harmless and defend **Authority**, its agents, servants, employees, directors, officers, contractors, subcontractors and suppliers, from and against any claims made against **Authority**, its agents, servants, employees, directors, officers, contractors, subcontractors and suppliers, arising therefrom. For the purposes of this **Agreement**, "**Hazardous Material**" shall mean any substance (i) defined as "**hazardous substance**" under Section 1.01(14) of CERCLA, 42 U.S.C. 9601(14) or any successor regulation; (ii) containing petroleum, including any fraction thereof; or (iii) determined to be deleterious to human health or the environment by any federal, state or local environmental, occupational health, or public health agency or authority. **City** expressly agrees to be responsible for any such contamination of the lands, property or **Right-of-Ways** of **Authority** or any adjacent premises as a result of **City's** (or its agent's, servant's, employee's, director's, officer's, contractor's, subcontractor's and supplier's) acts, omissions, negligence or due to the transportation of hazardous materials in the **Sewer Force Main**, and if any such contamination occurs, **City**, its successors and any permitted assigns, shall be responsible to clean-up, remediate and restore the land, property and **Right-of-Way** to their original condition or to a condition that is in compliance with applicable state and federal laws and regulations and all local ordinances.

3.4 Upon complying with the ADVANCE NOTIFICATION provisions of Section 14 herein, **City** may enter upon **Authority's** property described herein, as necessary in the course of non-disruptive, day-to-day operations, such as patrolling and leak surveying and for the purpose of inspection and maintenance of the **Sewer Force Main**. During excepted Emergency Response Procedures, such as investigating a reported leak, **City** is not required to provide advance notification to **Authority**. In the event an emergency exists that is dangerous to the life, safety or welfare of the public or **Authority's** property and which requires immediate repair, **City** may enter upon **Authority's** property without advance notice for the purpose of taking all necessary and reasonable safety measures to protect the public and the **Authority's** property from injury or damage. In such an event, **City** shall advise the Director of **Authority** or his duly authorized representative, as soon as possible. Any damage done to the **Right-of-Way** or **Authority's** property shall be immediately restored to its original condition by **City** and at its sole expense.

3.5 **City** shall not construct any pumping stations in, on or over **Right-of-Way** and shall not construct any equipment or apparatus which is not situated underground.

#### **SECTION 4. INGRESS AND EGRESS**

4.1 **Authority** does not undertake to provide a means of ingress and egress for **City**, except over lands of **Authority**, as herein specified or as specified in the **Plans and Specifications**, and in a manner approved by the Director of **Authority** or his duly authorized representative.

#### **SECTION 5. CONSTRUCTION**

5.1 The **Sewer Force Main** shall be designed and initially constructed strictly in accordance with the **Plans and Specifications** and in accordance with applicable specifications and regulatory requirements of The American Railway Engineering and Maintenance Association (AREMA). In the event any applicable laws or orders of public authority prescribe a higher degree of protection, then **City** shall comply with such higher degree of protection prescribed. In addition, the **Sewer Force Main** shall be constructed in accordance with the latest revision of the standards published by the Institute of Electrical and Electronics Engineers, Inc., American National Standard - National Electrical Safety Code and in accordance with the specifications of the I.C.C. General Order 160 as set forth in the law(s) or order(s) of said I.C.C. General Order 160 now existing, or any law(s) or order(s) hereafter passed or made, which may be applicable to the **Sewer Force Main** provided for herein.

5.2 The design and construction of the **Sewer Force Main** will be solely the responsibility of **City**, subject to the advanced review and written approval by **Authority** with regard to location and manner of adjustment. The **Sewer Force Main** shall be of durable materials designed for long service life and relatively free from routine servicing and maintenance. Conformance with current applicable material specifications and codes is mandatory. **City** shall be fully responsible for installing any casing specified on the approved plans and specifications. **City** shall be responsible for determining the location, elevation and extent of all utilities, underground structures and/or obstructions in the vicinity of the installation

whether shown on the approved plans and specifications or not. **City** shall construct no above ground structures, equipment or apparatus.

5.3 Prior to any excavation taking place, **City** must obtain the advance written approval of **Authority** as to the location thereof. If it is determined by **Authority** that shoring is necessary for any excavation, it will be the responsibility of **City** to submit a shoring design for advance approval by **Authority**.

5.4 **City's** use, as herein defined, shall be such that it shall not in any way interfere with natural drainage of **Authority's** lands and **Right-of-Way**. Any drainage facilities required shall be constructed, maintained, repaired and removed by **City**, at **City's** sole cost and expense, and all work associated therewith shall be subject to the advance written approval of the Director of **Authority**, or his duly authorized representative. The **Sewer Force Main** shall be bedded with pervious materials and outlets for entrapped water and under drains where necessary.

5.5 All ground profiles and vegetation cover must be reestablished to preconstruction standards for the initial installation and all future maintenance work. Areas of **Authority's** property and/or **Right-of-Way** disturbed by the installation, maintenance, removal or relocation of the **Sewer Force Main** shall be kept to a minimum. Disturbed areas shall be returned by **City** to normal grade and elevation, with compaction of backfill material, and all excess or undesirable material removed by **City** at its sole expense. Destroyed vegetation shall be replaced by **City** by sodding, or seeding, fertilizing and mulching, or a combination thereof as determined by **Authority**. Protection against erosion shall be provided by **City**, at its sole expense, in disturbed areas. Such protection may be in the form of rock rip-rap, wash checks, hay or straw cover, or other material that is approved in advance by **Authority** and does not interfere with railroad maintenance.

5.6 Exceptions to any design, location, construction or methods of installation provisions contained in this **Agreement** and attachments, must be authorized in writing by the Director of **Authority**, or his duly authorized representative. Exceptions will be considered only where it is shown that extreme hardship and/or unusual conditions provide justification and where alternate measures can be prescribed in keeping with the intent of this **Agreement**. All requests for exceptions shall be fully documented by **City** including design data, cost comparisons and other pertinent information.

5.7 Except as otherwise specifically permitted in the **Plans and Specifications**, other equipment necessary for **City's** operation of the **Sewer Force Main** must be located outside the limits of the **Right-of-Way**.

5.8 **City** or its contractor shall contract with North Shore Track Services, Inc. for the removal and reinstallation of all track, track materials and ties, at the expense of **City** or its contractor. No track, track materials or ties shall be removed or reinstalled except by North Shore Track Services, Inc.

## **SECTION 6. TIME OF CONSTRUCTION, LIQUIDATED DAMAGES**

6.1 Time is an essential element of this Agreement.

6.2 **City** shall fully complete the installation of the **Sewer Force Main** and fully restore the **Right-of-Way**, track, track materials and ties, by not later than April 15, 2012, except that seeding and paving shall be completed by June 30, 2012.

6.3 If **City** fails for any reason to complete installation of the **Sewer Force Main** and to fully restore the **Right-of-Way** and Lakefront Line track, track materials and ties by April 15, 2012, **City** shall be obligated to pay to **Authority** as liquidated damages, and not as a penalty, the amount of **One Thousand Two Hundred and No/100 Dollars (\$1,200.00)** per calendar day for each day after April 15, 2012 that the project is not fully completed as required by this Section 6. **City** acknowledges that **Authority** will be liable to its railroad services contractor, North Shore Scenic Railroad, for lost passenger revenues which are substantial but difficult to prove with specificity and as to which the amount of liquidated damages specified herein is a fair and reasonable and consistent with historical data.

Payment of liquidated damages by **City** to **Authority** shall be remitted monthly commencing April 30, 2012 and continuing until the project is completed. Said liquidated damages shall be an additional fee payable to **Authority** by **City** hereunder and the amount of liquidated damages assessed hereunder shall be in addition to every other remedy now or hereinafter enforceable at law, in equity, by statute or under this Agreement. Failure to pay liquidated damages when due and payable shall constitute default under this Agreement and shall be a basis for **Authority** to terminate the license granted hereunder.

6.4 In addition, **City** shall fully complete the work that crosses the track between MP 4.9 and MP 4.91 within a period of seven (7) calendar days commencing with the date of track removal. The seven (7) calendar day period is inclusive of the time for track restoration. The seven (7) consecutive calendar day period shall commence not later than February 13, 2012. Failure of **City** to fully complete the work described in this Paragraph 6.4 within the allowed seven (7) consecutive calendar day period shall constitute a default within the meaning of Section 13.2 of this **Agreement**.

## **SECTION 7. MATERIALS AND WORKMANSHIP**

7.1 All materials and workmanship required in the construction, maintenance, repair, replacement, relocation and removal of the **Sewer Force Main** shall be furnished by **City**, but shall be subject at all times to inspection by the Director of **Authority**, or his duly authorized representative. Any materials or workmanship declared to be unsatisfactory by **Authority** shall be replaced by **City** at its own expense with materials and workmanship satisfactory to **Authority**. The privilege of inspecting the materials and workmanship involved in the construction, maintenance, repair, relocation and/or removal of the **Sewer Force Main** and to notify **City** to renew, repair or replace materials and workmanship unsatisfactory to **Authority** shall not be construed as imposing any obligation whatsoever on **Authority** to inspect such materials and workmanship and to notify **City** to renew, repair and replace any materials or workmanship, it being the intent of the parties to this **Agreement** that the sole responsibility for

the materials and workmanship used in the construction, maintenance, repair, relocation and/or removal of the **Sewer Force Main** shall at all times be that of **City** alone.

7.2 The **Sewer Force Main** and any replacement thereof, shall be constructed by **City** with satisfactory joints, materials and design which will provide protection and resistance to damage from sulfide gases and other corrosive elements to which they may be exposed. Where casing pipe is used, sealing of casing is required. Where non-metallic pipe is permitted and installed, a durable metal wire shall be concurrently installed, or other means shall be provided for detection purposes, as may be required by **Authority**. The **Plans and Specifications** set forth the approved requirements for initial construction of the **Sewer Force Main** in regard to these matters.

#### **SECTION 8. MAINTENANCE, SERVICING AND REPLACEMENT OF SEWER FORCE MAIN**

8.1 Any and all maintenance, repair or replacement of the **Sewer Force Main** shall be the sole responsibility of **City** and at its sole expense. Except in the event of an emergency, **City** shall comply with the ADVANCE NOTIFICATION provisions of Section 14 herein before entering upon **Authority's** property or the **Right-of-Way**. Maintenance and repair must be performed by **City** so as to keep the **Sewer Force Main** in an as-constructed condition, and in a good state of repair in accordance with the requirements of applicable Federal, State and Local laws, regulatory standards and utility codes, as well as any requirements of **Authority**.

8.2 **City** shall be responsible at its sole cost and expense to replace and stabilize all earth cover and vegetation if and when it has eroded over the **Sewer Force Main License Area** where such erosion is due to, or caused by, the placement or existence of the **Sewer Force Main**. **City** is also responsible for the repair of any settlement of backfills, fills and embankments which may occur due to the placement or existence of the **Sewer Force Main**.

8.3 **City** shall remove any unused material or debris and all construction equipment from the work site area and **Right-of-Way** at the end of every construction day and maintenance/repair day.

8.4 **City** shall submit to **Authority** for its prior approval, all plans and specifications concerning maintenance or repair work to be performed by **City** in regard to the **Sewer Force Main**, other than routine, day-to-day inspection and maintenance.

8.5 When, in the opinion of **Authority**, the **Sewer Force Main** is in a defective or dangerous condition, **City** shall, at its own cost and expense, within ten (10) calendar days after mailing of written notice from **Authority**, submit a preliminary, tentative plan to renew, repair or replace the **Sewer Force Main** in a manner reasonably satisfactory to the Director of **Authority**, or his duly authorized representative. Upon approval of a final plan by the Director of **Authority**, **City** shall initiate the renewal, repair or replacement of the **Sewer Force Main** within a reasonable time in accordance with the approved plan and shall continue renewal, repair or replacement without interruption to completion. For the purposes of this Section 8.5, a "reasonable time" will be determined by reference to the imminence of harm, damage or destruction to health or property; likely magnitude of the harm, damage or destruction, and the



disruption of **Authority's** activities which may be caused by the defective or dangerous condition. However, the cost or expense involved in remedying the defective or dangerous condition shall not be a factor in determining "reasonable time".

## **SECTION 9. RELOCATION CHANGES AND ALTERATIONS**

9.1 When and as often as **Authority** shall require to have the location and/or elevation of the **Sewer Force Main**, or any portion thereof, change for the purposes of making improvements to the facilities of **Authority**, or minimizing any hazards presented by the **Sewer Force Main** or the contents thereof, all as determined in **Authority's** sole discretion, **City** shall, at its own cost and expense, with due diligence and within a reasonable period of time after receipt of written notice from **Authority**, change the location and/or elevation of the **Sewer Force Main**, or any portion thereof, to such a location and/or elevation as shall be reasonably designated by the Director of **Authority** or his duly authorized representative.

9.2 In the event **City** submits in writing a request to **Authority** to extend the relocation period, **Authority** shall respond within thirty (30) calendar days.

9.3 **City** agrees that upon request from **Authority**, **City** will, at its own cost and expense, make changes or alterations to the **Sewer Force Main** when, in **Authority's** sole opinion, **Authority's** operations require modification to the **Sewer Force Main**, or to minimize hazards presented by the **Sewer Force Main** or the contents thereof.

9.4 In the event **City** shall fail to change the location or elevation of, renew, repair or replace, alter, maintain, service, or make any changes requested by **Authority**, to the **Sewer Force Main**, or any portion thereof, or to correct any dangerous or defective condition, or fails to perform any other matter required of **City** hereunder, after mailing of written notice from **Authority** as hereinbefore provided and within the time stipulated, then **Authority** may, without further notice to **City**, perform said work, all at the sole risk, cost and expense of **City**, or at **Authority's** option, declare this license terminated and require **City** to remove the **Sewer Force Main** and restore the premises to its original condition.

## **SECTION 10. INSURANCE**

10.1 Prior to use of the **Right-of-Way** and/or exercise of any of the privileges and activities provided by this **Agreement**, **City**, at its sole cost and expense, shall procure and maintain, or require the procurement and maintenance during the term of this **Agreement** insurance, or State approved self-insured status, adequate to cover all liability hereunder assumed by **City** and to protect **Authority**, its officers, directors, employees, agents, contractors, subcontractors and suppliers with respect to losses arising out of the use of the **Right-of-Way** and/or construction, repair or maintenance of the **Sewer Force Main** by **City**, its officers, employees, agents, contractors, subcontractors and suppliers.

10.2 Such insurance coverage shall be placed with insurance carriers acceptable to **Authority** and shall include but not be limited to:

1. Statutory Workers' Compensation/Employers Liability with an Employers Liability Limit of not less than \$1,000,000 Each Accident.
2. Commercial General Liability Insurance Coverage, including contractual coverage, with a limit of not less than \$1,000,000 Each Occurrence/\$5,000,000 Annual Aggregate.
3. Commercial Automobile Liability Insurance Coverage with a limit of not less than \$1,000,000 Each Accident.
4. All Risk Property Insurance including Flood and Earthquake in an amount of \$10,000,000 to provide protection for loss or damage to any property of **Authority**, or the property of others in the care, custody or control of **City**, its officers, employees, agents, contractors, subcontractors and suppliers. Such policy is to include **Authority** as a Loss Payee as applicable.

In addition, for the full term of any construction or maintenance operations provided by this **Agreement** or taking place or utilizing **Authority's** right-of-way, **City** shall provide or cause to be provided the following:

5. Commercial Umbrella Insurance Coverage with a limit of not less than \$4,000,000 Each Occurrence/\$4,000,000 Aggregate. The coverage provided by this policy shall be at least as broad in scope as the underlying liability coverage's specified in (1), (2) and (3) above.
6. Railroad Protective Liability Insurance in the amount of \$2,000,000 for Each Occurrence and \$6,000,000 in the Aggregate.

10.3 **Authority** and **City** acknowledge that **City** is a self-insured political subdivision of the State of Minnesota pursuant to Minn. Stat. §471.981 with respect to public liability; Minn. Stat. §176.181 with respect to workers' compensation; and Minn. Stat. §65B.48 with respect to no-fault auto liability. **City** represents that under the provisions of Minn. Stat. §466.09, it has the power and a statutory duty to levy taxes sufficient to pay any and all judgments rendered against it. During the term of this **Agreement**, **City** shall maintain all of the above self-insurance programs in strict accordance with the laws and rules of the State of Minnesota and shall at all times be certified by the State of Minnesota to operate said self-insurance program and shall afford **Authority** the coverage's set forth in subsection 10.2 above. In addition, **City** shall receive and investigate any and all claims related to or arising out of this **Agreement**. **City** shall also contract with legal counsel to pursue any negotiations or litigation that may be necessary based upon the circumstances of any claim involving this **Agreement**. **City** shall set aside funds for potential claims arising under this **Agreement** as required by State insurance regulations. **City** agrees that in case of any judgment in excess of funds so reserved, it will levy taxes to pay such judgment. **City** agrees that it shall use its State approved self-insurance program to indemnify **Authority** as provided in Section 11 of this **Agreement**. If **City** ceases to maintain any of its self-insurance programs relating to insurance coverage required by this Section 10.3, or if any of said self-insurance programs fail to be approved by the State of Minnesota, or if **City**

shall cease to have the power to levy taxes in an amount to cover any judgment against it, then **City** shall immediately purchase insurance as set forth in subsection 10.2 of this Section 10, and submit required certificates and policies to **Authority** as provided in this Section 10.

10.4 All of the above policies shall name **Authority**, its officers, directors, employees, and agents as additional insured and shall be endorsed to provide coverage to these additional insureds on a primary basis without seeking contribution from any other insurance or self insurance available to **Authority**. In addition, the policy shall contain Severability of Interest Clauses and Waivers of Subrogation in favor of **Authority**, its officers, directors, employees and agents.

10.5 **City** shall furnish to **Authority's** Director insurance certificates in a form acceptable to **Authority**, evidencing compliance with the foregoing requirements and stating that the insurers will provide thirty (30) calendar days' advance written notice to **Authority** of the cancellation or material alteration in any of the required policies of insurance.

10.6 All coverages are to be written on occurrence based policy forms with insurers acceptable to **Authority**. Claims made policy forms are subject to prior review and written approval by **Authority**.

10.7 **City** shall also require its contractors, suppliers, sublessees, etc., to carry and furnish evidence of the above coverages.

10.8 The providing of the above required insurance coverages shall not be deemed a limitation on the liability of **City** as provided in this **Agreement**, but shall be additional security therefor.

10.9 **City** shall comply with all of the above described certificate of insurance requirements prior to accessing **Authority's Right-of-Way** at any time.

10.10 All insurance required to be carried by **City** shall be with insurance companies subject to **Authority's** approval.

10.11 Renewal certificates shall be furnished to **Authority** not less than thirty (30) calendar days prior to the expiration of the coverage's required by this Section 10. The insurances required hereunder shall be maintained in full force and effect until **Authority** finally releases in writing **City** from all obligations under the terms of this **Agreement**.

## **SECTION 11. INDEMNITY AND LIABILITY**

11.1 **City**, its successors and any permitted assigns, shall assume all risk and liability for accidents and damages that may occur to person or properties on account of or in any way related to the construction, maintenance or operation of the **Sewer Force Main**, and the **City** does hereby indemnify and hold harmless **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, servants, employees and agents, from any and all costs, liabilities, expenses, suits, judgments or damages to person or property or claims of any nature whatsoever arising out of or in any way related to the construction, maintenance, or

operation of the **Sewer Force Main** or performance by **City**, its agents, servants, employees, officers, directors, contractors, subcontractors or suppliers of any of the obligations or privileges provided under this **Agreement**.

11.2 **City**, for itself and its successors, assigns, agents, servants, employees, directors, officers, contractors, subcontractors and suppliers, as part of the consideration for this **Agreement**, hereby releases and waives any and all claims and demands that it may or might have against **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, employees, servants, agents, contractors, subcontractors or suppliers, for or on account of any damage or injury to the **Sewer Force Main** or property of **City**, whether or not attributable to the sole or concurrent fault, failure or negligence of **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, employees, servants, agents, contractors, subcontractors or suppliers, except the foregoing release and waiver shall not apply to damage or injury to the **Sewer Force Main** or property of **City** caused by the intentional unlawful or fraudulent conduct of **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, employees, servants, agents, contractors, subcontractors or suppliers.

11.3 **City**, for itself, its successors and any permitted assigns, does further agree to indemnify, protect and save harmless **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, servants, agents and employees from any and all claims, demands, awards and actions made, brought or obtained against **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, servants, agents or employees, by anyone, including but not limited to claims brought by **City**, its agents, servants, directors, officers, contractors, subcontractors, suppliers or employees, for any and all injuries to person, including death arising therefrom, and damages to property due to, caused by or growing out of any accident or occurrence which but for this **Agreement** or the presence of **City's** employees, agents, servants, contractors, subcontractors or suppliers pursuant to this **Agreement**, would not have occurred or been incurred, even when such damages and injuries are attributable to the sole or concurrent fault, failure or negligence of **Authority**, its officers, directors, agents, servants, employees, contractors, subcontractors or suppliers. **City** agrees to defend, at its own expense, any suit or action brought against **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, servants, agents or employees, by reason of any matter referred to herein, and pay any judgment recovered or rendered in any such suit or suits. Notwithstanding anything in this Section 11.3 to the contrary, the foregoing release and waiver shall not apply to damage or injury caused by the intentional unlawful or fraudulent conduct of **Authority**.

11.4 **City** agrees to protect the property of **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, agents, servants, employees, contractors, subcontractors and suppliers (including rolling stock as well as stationary facilities) from damage on account of any accident or occurrence which but for this **Agreement** and privileges herein granted would not have occurred or been incurred, and to promptly reimburse **Authority**, its successors, assigns, affiliates, subsidiaries, parent company, officers, directors, agents, servants, employees, contractors, subcontractors and suppliers for any and all such loss or damage.

## **SECTION 12. ASSESSMENTS AND TAXES**

12.1 **City**, as part of the consideration for this **Agreement**, agrees to pay all assessments and taxes on any lands or facilities of **Authority**, which assessments and/or taxes result from the **Agreement** and privileges herein granted to **City**.

## **SECTION 13. TERMINATION**

13.1 It is mutually agreed between the parties hereto that this **Agreement** and the privileges granted herein shall be and continue in full force and effect, unless sooner terminated as provided herein, until twelve (12) consecutive months after **City** shall cease to use the **Sewer Force Main** or any replacement of the **Sewer Force Main** for the purpose herein stated, at which time the rights granted herein shall cease and terminate absolutely and this **Agreement** shall be null and void, except for **City's** continuing obligations to remove the **Sewer Force Main** and restore the **Right-of-Way** and **Authority's** other property and its other obligations specifically provided in this **Agreement**.

13.2 In the event of **City's** breach of any covenant, condition, payment or other obligation under this **Agreement**, **Authority**, its successors and assigns, shall provide **City** with written notice of breach and fifteen (15) calendar days in which to cure such breach. Any breach by the **City** which is not cured within the time provided shall entitle **Authority** to liquidated damages as provided in Section 6 of this **Agreement** or, at **Authority's** election, injunctive relief, specific performance and damages, together with such attorney's fees and costs as **Authority** may incur as a result of such breach or the enforcement of **Authority's** rights pursuant to this **Agreement**, and shall constitute cause for termination of this **Agreement** by **Authority**. **City** shall immediately discontinue construction and/or operation of the **Sewer Force Main** upon such termination. **Authority's** exercise of its right to terminate this **Agreement** shall not excuse **City** from the fulfillment or satisfaction of any obligation under this **Agreement** which has accrued prior to **Authority's** termination of the **Agreement** or of any obligations which this **Agreement** provides shall survive or be performed upon termination.

13.3 All notices and communications concerning this **Agreement** shall be addressed to **Authority** or to **City** at their respective addresses as set forth in Section 31 herein, or at such other address as either party may designate in writing to the other party.

13.4 Upon termination of this **Agreement**, **City** shall remove the **Sewer Force Main** and all of its property, if any, within the time specified in any notice of termination. In effecting such removal, the premises and property of **Authority** shall be restored by **City** to a condition satisfactory to **Authority's** Director, or his duly authorized representative. If **City** shall fail to make the removal in the manner and time set forth herein, **Authority** may perform the removal and make said restoration, all at the sole risk, cost and expense of **City**, and may also dispose of any removed items without the necessity to account for the same or to give further notice to **City**.

13.5 If **City** shall fail to make the required removal, **Authority** shall have the further option to elect and notify **City** that all right, title and interest of **City** in any of its property shall be forfeited and shall vest absolutely in **Authority** as of the date of notice of such election.

#### **SECTION 14. ADVANCE NOTIFICATION**

14.1 **City** shall notify the Director of **Authority**, in writing, three (3) business days (Monday-Friday) prior to starting construction and again by telephone at (218) 254-0086 at least twenty-four (24) hours before **any** work herein provided is to be undertaken.

14.2 Each contractor, engineering firm, individual or other business entity, if any, retained by **City** in conjunction with this **Agreement** shall obtain a temporary permit from **Authority** prior to occupation of the **Sewer Force Main License Area, Construction Work Limits, Sewer Force Main, Right-of-Way** or any other property of **Authority**.

#### **SECTION 15. ORDINANCES, REGULATIONS, RULES AND APPLICABLE LAWS**

15.1 **City**, at **City's** sole cost and expense, shall comply with all applicable ordinances, rules, regulations, requirements and laws of any governmental authority, federal, state or local, having jurisdiction over the construction of the **Sewer Force Main** and/or **City's** use, maintenance, repair and occupation under this **Agreement**, including but not limited to zoning, health, safety, building and/or environmental matters.

15.2 **City** shall further defend, indemnify and hold **Authority** harmless from any violations of such laws, ordinances, rules, regulations and/or requirements, any penalty, levy, fine or assessments therefrom, and all costs of defense of or compliance with any citation, order or violation notice(s), including but not limited to any such penalties, levies, fines, assessments, compliance or remedial charge(s) arising after termination of this **Agreement**. For the purposes of this Section 15.2, the term **Authority**, shall include not only the **Authority** named herein but also any parent companies, subsidiaries, affiliates, successors, or assigns of **Authority**, or its or their agents, servants, employees, directors, officers, contractors, subcontractors or suppliers.

15.3 It is **City's** sole duty, responsibility and obligation to determine and obtain any permit, license or other permission required by law in order for **City** to perform its obligations provided in this **Agreement** including, but not limited to, the construction, maintenance, repair, relocation or replacement of the **Sewer Force Main**. **City** shall provide **Authority** with a copy of any required permits, licenses, or other permission or documentation prescribed by law prior to commencing or engaging in the regulated activity.

#### **SECTION 16. CLAIM OF TITLE**

16.1 **City** shall not at any time own or claim any right, title or interest in or to the lands of **Authority**, the **Right-of-Way** of **Authority** nor shall the continued existence of this **Agreement** for any length of time give rise to any right, title or interest in and to the lands or **Right-of-Way** of **Authority** other than as specifically provided in this **Agreement**.

#### **SECTION 17. RECORDING**

17.1 Upon the request of either party, the other party shall join in the execution of a memorandum or so-called "short form" of this **Agreement** for the purpose of recordation. Said

memorandum or short form of this **Agreement** shall describe the parties, the termination provisions of this **Agreement** and shall incorporate this **Agreement** by reference. The party requesting the recording shall pay the recording costs.

#### **SECTION 18. LIMITATIONS, RESERVATIONS AND RESTRICTIONS**

18.1 This **Agreement** is made on an **AS IS BASIS** without warranties or representations of any nature or kind by **Authority** and subject to all of the limitations, reservations and restrictions upon the title of **Authority** and its right to use the **Right-of-Way** or other property. **Authority** does not warrant or represent the extent or duration of its interest, if any, in such property.

#### **SECTION 19. INSPECTION**

19.1 Notwithstanding any other provision of this **Agreement**, nothing contained herein shall relieve **City** from its obligation to inspect and at all times maintain in good condition and repair the **Sewer Force Main** and facilities located under, along and across the land and **Right-of-Way** of **Authority**, or impose any obligation upon **Authority** in respect to such inspection and maintenance.

#### **SECTION 20. SUCCESSORS AND ASSIGNS**

20.1 The terms, conditions, covenants and provisions of this **Agreement** shall inure to the benefit of and be binding upon the successors and assigns of **Authority** and the successors and assigns of **City**, provided, however, **City** may not assign, convey or encumber its rights under this **Agreement** except as set forth in Section 21 below.

#### **SECTION 21. TRANSFER, ASSIGNMENT OR SUBLICENSE**

21.1 **City** shall not transfer, encumber or assign this **Agreement** or any of its rights and privileges herein granted, except with the prior written consent of **Authority**, which consent may be granted or withheld in the sole discretion of **Authority**. This covenant shall also apply whether such transfer is made voluntarily by **City** or involuntarily in any proceeding at law or in equity to which **City** may be a party whereby any of the rights, duties and obligations of **City** shall be transferred, abrogated or in any way altered, without the prior notice to and consent of **Authority**. In the event of any such unauthorized transfer, encumbrance or assignment of this **Agreement**, or any of the rights and privileges of **City** hereunder, **Authority**, at its option, may immediately terminate this **Agreement** by giving **City** or any transferee or assignee written notice of such termination.

#### **SECTION 22. INDUCTIVE INTERFERENCE**

22.1 **City** further agrees that in the event at any time hereafter **Authority's** wire or radio communications systems, signal systems, or electric power systems, or any part of any of them, shall sustain any inductive interference which in the sole opinion of the Director of **Authority** results, directly or indirectly from the installation, maintenance, operation or use of

the **Sewer Force Main** or **City's** equipment, **City** immediately upon demand to do so shall cause such interference to be eliminated without cost or expense to **Authority**.

### **SECTION 23. TRACKS**

23.1 It is understood and agreed that the permission herein granted to **City** does not include the right to move heavy equipment or vehicles over any unprotected tracks of **Authority**.

23.2 If, after the initial construction, in the judgment of the Director of **Authority**, it shall be necessary to protect the property of **Authority**, or property in its care and custody by use of crossing flagmen, or other protective measures which are required because of the **Sewer Force Main** or **City's** operations, it is understood and agreed that **City** shall promptly reimburse **Authority** for the entire cost and expense thereof if **Authority** undertakes to provide or obtain such services.

### **SECTION 24. MARGINAL NOTES**

24.1 Marginal notes used herein are placed for reading convenience and shall not have any other meaning, implication or purpose, legal or otherwise.

### **SECTION 25. ENTIRE AGREEMENT**

25.1 This **Agreement** and the Exhibits, and Rider, if any, attached hereto and forming a part hereof, set forth all the covenants, promises, agreements, conditions and understandings between **Authority** and **City** concerning the subject matter of this **Agreement** and there are no other covenants, promises, agreements, conditions or understandings, either oral or written between the parties hereto. Except as herein otherwise specifically provided, no alteration, amendment, change or addition to this **Agreement** shall be binding upon **Authority** or **City** unless reduced to writing and signed by both parties.

### **SECTION 26. GOVERNMENTAL APPROVAL**

26.1 To the extent required by law, this **Agreement** shall be subject to the approval, if necessary, of any State or Federal Commerce Commission, Board of Public Utility Commissioners, Public Service Commission or any other such Federal, State or local governmental body as may have jurisdiction.

### **SECTION 27. INTERPRETATION**

27.1 This **Agreement** shall be governed by and construed in accordance with the laws of the State of Minnesota, and all terms of this **Agreement** shall be interpreted in accordance therewith.



## **SECTION 28. PARTIAL INVALIDITY**

28.1 The invalidity, unenforceability or unconstitutionality of any particular provision of this **Agreement** shall not affect the other provisions hereof, and this **Agreement** shall be construed in all respects as if such invalid, unconstitutional or unenforceable provision or provisions were limited in scope and effect to the extent necessary to render such provision or provisions valid, enforceable and constitutional, and if such a limiting construction is not possible, such provision or provisions shall be omitted.

## **SECTION 29. NON-WAIVER OF COVENANTS**

29.1 The failure of either party to enforce any of the provisions of this **Agreement** at any time shall in no way be construed to be a waiver of such provisions in the future nor in any way affect the validity of this **Agreement**, or any part thereof, nor the right of any party thereafter to enforce each and every such provision.

## **SECTION 30. NOTICES**

30.1 Any notice, other than **ADVANCE NOTICE** described in Section 14, required or permitted to be given under this **Agreement** shall be in writing and deemed to have been given when deposited in a United States Post Office, registered or certified mail, postage prepaid, return receipt requested and addressed as follows:

If to **Authority**:        St. Louis & Lake Counties Regional Railroad Authority  
Robert Manzoline, Executive Director  
111 Station 44 Road  
Eveleth, MN 55734

If to **City**:            City of Duluth  
City Hall  
411 West First Street  
Duluth, MN 55802

## **SECTION 31. RELATIONSHIP OF THE PARTIES**

31.1 The relationship of the parties is that of independent entities and in no way establishes a partnership, agency or joint venture relationship.

## **SECTION 32. SURVIVAL OF COVENANTS**

32.1 Notwithstanding any other provision of this **Agreement**, the rights and obligations of the parties expressed in this **Agreement**, including but not limited to, any provisions concerning indemnity and liability, shall remain in effect for any legal proceeding brought against **Authority**, or its agents, servants, employees, directors, officers, successors or assigns, which was commenced after the termination of this **Agreement**, for whatever reason, but was caused by, alleged to be caused by, or grew out of any accident or occurrence which but

for this **Agreement**, the **Sewer Force Main** or the presence of **City's** officers, agents, employees, servants, contractors, subcontractors or suppliers pursuant to this **Agreement**, would not have occurred or been incurred, even when such proceeding is attributable to the sole or concurrent fault, failure or negligence of **Authority**, its officers, agents, employees, servants, contractors, subcontractors or suppliers.

**IN WITNESS WHEREOF**, the parties have mutually executed this **Agreement**, in duplicate, as of the day and year first above written.

**ST. LOUIS & LAKE COUNTIES  
REGIONAL RAILROAD AUTHORITY**

**CITY OF DULUTH, ST. LOUIS  
COUNTY, MINNESOTA**

By: \_\_\_\_\_  
Rick Goutermont  
Acting Chair of the Authority

By: \_\_\_\_\_  
Don Ness  
Mayor - Duluth, Minnesota

Date: \_\_\_\_\_

Countersigned:

By: \_\_\_\_\_  
Auditor

Date: \_\_\_\_\_

Attest:

By: \_\_\_\_\_  
City Clerk

Date: \_\_\_\_\_

Approved:

By: \_\_\_\_\_  
City Attorney

Date: \_\_\_\_\_

[illegible]

On this \_\_\_\_\_ day of \_\_\_\_\_, 2011, before me, a Notary Public within and for said County and State, personally appeared Rick Goutermont, to me known, who being by me duly sworn, did say that he is the Acting Chair of the St. Louis and Lake Counties Regional Railroad Authority named in the foregoing instrument, and acknowledged the instrument to be the free act and deed of the St. Louis and Lake Counties Regional Railroad Authority.

Notary Public

[illegible]

On this \_\_\_\_\_ day of \_\_\_\_\_, 2011, before me, a Notary Public within and for said County and State, personally appeared Don Ness, to me known, who being by me duly sworn, did say that he is the Mayor of the City of Duluth, a municipal corporation and governmental subdivision of the State of Minnesota and they acknowledged the instrument to be the free act and deed of the Corporation.

Notary Public

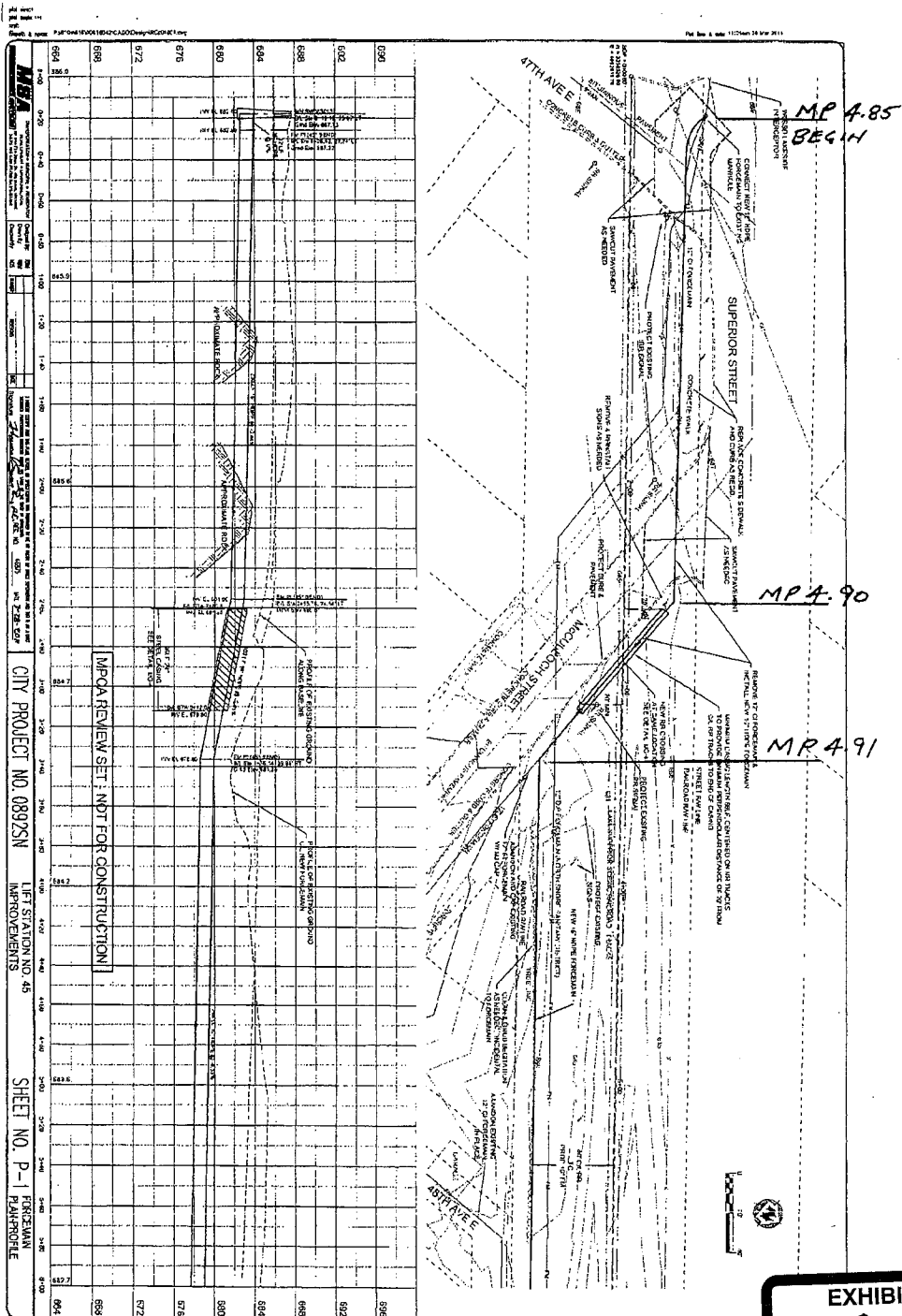


EXHIBIT  
A

